No. 84-902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WARDAIR CANADA, INC.,
Appellant,
v.
STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

BRIEF OF AMICUS CURIAE AER LINGUS, AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., ALIA-ROYAL JORDANIAN AIRLINES, ALITALIA-LINEE AEREE ITALIANE S.P.A., AMERICAN AIRLINES INC., BRITISH AIRWAYS PLC., BRITISH CALEDONIAN AIRWAYS LTD., CHINA AIRLINES LTD., COMPAGNIE NATIONALE AIR FRANCE, COMPANIA MEXICANA DE AVIACION S.A. dE C.V., DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT, EL AL ISRAEL AIRLINES LIMITED, EMPRESA ECUATORIANA DE AVIACION, FINNAIR OY, IBERIA AIRLINES OF SPAIN, ICELANDAIR, JAPAN AIR LINES COMPANY LTD., KLM ROYAL DUTCH AIRLINES, LINEAS AEREAS COSTARRICENSES, S.A., QANTAS AIRWAYS LIMITED, SCANDINAVIAN AIR LINES SYSTEM, SOCIETE ANONYME BELGE d'EXPLOITATION DE LA NAVIGATION AERIENNE, SWISS AIR TRANSPORT COMPANY LIMITED, TAP-AIR PORTUGAL, TRANSPORTES AEREOS NACIONALES, S.A., TRINIDAD & TOBAGO AIRWAYS CORPORATION, AND VIACAO AEREA RIO GRANDENSE, AMICI CURIAE

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QUESTION PRESENTED

Whether an excise tax imposed by the State of Florida on aviation fuel purchased by foreign airlines for use exclusively in foreign air commerce unconstitutionally infringes upon the power of the Government of the United States to regulate foreign commerce.

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This brief is filed pursuant to written consent of all parties to this case in accordance with Supreme Court Rule 36.2.

INTEREST OF THE AMICI CURIAE

This case requires the Court to decide an issue of great importance to the international aviation industry—whether individual states (or, by extension, local governments) can impose excise taxes on aviation fuel used solely to power aircraft operated by foreign airlines in in international commerce when such taxes: (1) intrude into an area that must be governed solely by a single uniform policy established by the Federal Government, and (2) are contrary to well-settled Federal Government policies and accepted international standards. The *Amici Curiae* are a group of 29 international airlines whose operations will be directly affected by the decision of the Court in this case. Twenty-eight of them are foreign airlines representing 28 nations in Latin America, Europe, Asia, and the Middle East. Included in this group are carriers of virtually all of the major international trading partners of the United States. A number of these foreign carriers serve the State of Florida and thus will be directly affected by the decision of this Court regarding the Florida fuel tax. The remaining foreign carriers serve other points in the United States, and face the likelihood of state and local sales taxes on aviation fuel purchased in this country if this Court upholds the constitutionality of the Florida tax.

The *Amici Curiae* also include American Airlines, a United States carrier having substantial international operations. American currently is exempted from taxes on aviation fuel that might otherwise be imposed by local jurisdictions in foreign countries due to the reciprocal treatment that has traditionally been accorded foreign carriers in the United States.

A decision of this Court sustaining the Florida fuel tax would have significant adverse consequences to the *Amici*:

(1) It would permit other states and localities to impose similar taxes on purchases of aviation fuel used exclusively in international air transportation.

(2) It would create an atmosphere in which foreign nations are likely to take retaliatory action either by permitting their local governments to impose similar taxes or by imposing such taxes themselves in the belief that the reciprocity provided by the Federal Government on this issue is inadequate.

(3) It would shatter the international consensus carefully established over many years which provides for exemption of international airlines from such taxes on the basis of reciprocity.

The prospects of a proliferation of other state taxes and widespread retaliation by other countries are real. A number of other states and local jurisdictions have either adopted, or are contemplating adoption of taxes similar to the Florida tax.[1] Twenty-five foreign governments, including many of the most important international aviation trading partners of the United States, have submitted strongly worded diplomatic protests over the Florida tax, and a number of these notes have suggested the possibility of retaliatory actions.[2]

Perhaps the most pernicious effect of a decision sustaining the Florida tax would be its impact on the carefully crafted consensus of international reciprocity as a tool for dealing with the issue of the taxability of certain aspects of international air transportation. It has taken more than forty years for this international consensus to evolve, but the accepted—and almost universal—practice at the preesnt time is one of reciprocal tax exemptions

[1] *See* p. 6 *infra*.

[2] *See, e.g.*, Note No. 1679/E-375 of the Embassy of Colombia, Brief for the United States at 9a; Note of the Embassy of the Federal Republic of Germany, *Id.* at 21a; Note No. 106/84 of the Royal Norwegian Embassy, *Id.* at 43a.

for aircraft, equipment, and supplies, including aviation fuel. It is paradoxical in a sense that the case this Court has selected for review involves the appeal of an airline from the only country in the world that appears to allow aviation fuel taxes at other than the national level similar to the Florida tax whose validity is being challenged. However, the *Amici* firmly believe that the paradox is only an apparent one, and that the Canadian failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel purchases underscores the basic point that it is the Federal Government—and the Federal Government alone—that must be charged with the task of resolving the problem posed by the Canadian tax and the breach it has created in the solid wall of international reciprocal exemptions.

This case raises delicate questions of international trade and international relations that can only be addressed and resolved by the Federal Government. The *Amici* believe that the invalidation of the Florida tax is an essential step to enable the Federal Government to deal with the problem of Canada's local taxes on aviation fuel purchased by foreign airlines in that country. Such a step by this Court would reaffirm the primacy of the Federal Government's policy of reciprocal tax exemptions for fuel and other consumable supplies purchased by foreign airlines for use in foreign commerce, and would make it clear that no State can impose a tax that would subvert that policy.

This Court has recognized that the United States must speak with one unified voice in conducting its international relations, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), and that State taxes which either implicate foreign policy issues that must be left to the Federal Government or violate a clear federal directive are unconstitutional, *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). The Florida fuel tax presents a specific instance where these principles must govern, and where the need and prerogative of the Federal Government to deal with the international aspects of these taxes unhampered by unilateral State action must be recognized.

FACTUAL STATEMENT

The essential facts in this litigation are not in dispute. For a number of years the State of Florida imposed excise taxes on fuel purchased by airlines within its borders. Until April 1983, however, this tax had no significant effect on foreign airlines largely because it was prorated on a mileage basis so that only fuel consumed within the State of Florida was taxed.[3] Since foreign airlines serving Miami—Florida's principal international gateway—enter Florida airspace only briefly, foreign airlines paid virtually no fuel tax during this period. The rational of this proration provision was explained by the Florida Supreme Court in *Tropical Shipping & Construction Co. Ltd. v. Askew*, 364 So. 2d 433, 435 (Fla. 1978) in the following terms:

> The purpose of the partial tax exemption is to prevent the State from exceeding its powers to tax interstate and foreign commerce. The proration formula was designed so that Florida would only tax that portion of commerce activity that occurred within the State.

This system was drastically revised, effective April 1, 1983. Under Senate Bill 8A [4] proration was eliminated for airlines, although maintained for other carriers.[5] The rate of tax was increased to 5.7 cents per gallon.[6] A special credit against income taxes, designed to favor large U.S. carriers based in Florida, was also added.[7]

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[3] Fla. Stat. Ann. § 212.08(4) (West 1971).

[4] S.B. 8A, 1983 Regular Sess., 1983 Fla. Laws c. 83.

[5] Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp 1985).

[6] Technically the rate is five percent of a hypothetical price of $1.148 per gallon. *Id.* at §§ 212.62(b), (c).

[7] *Id.* at § 220.189.

The Florida fuel tax is at the vanguard of an effort by a number of State and local governments to tax purchases of international aviation fuel. Since this tax was adopted, the State of Illinois has established new tax burdens on aviation fuel purchased by foreign airlines through the reversal of a long standing administrative ruling.[8] Under color of enabling legislation passed by the Massachusetts legislature, the City of Boston has imposed taxes on fuel purchases at Logan International Airport.[9] The State of California [10] and the City of Chicago [11] also are currently considering taxes on aviation jet fuel. While this litigation concerns only the Florida fuel tax, the decision in this case clearly will have repercussions throughout the nation.

Except for American Airlines, *Amici* are all companies established under the laws of their foreign home countries, and are designated and licensed by those countries to serve the United States. All have been concurrently authorized by the Federal Government (first the Civil Aeronautics Board, more recently the Department of Transportation) to serve the United States.[12] None of the foreign carriers can operate domestic services within the United States, except under highly unusual circumstances.[13] Each of the foreign carriers is headquartered in its respective foreign country and is substantially owned and effectively controlled by the government or by nationals of that country.[14] Each purchases substantial amounts of aviation fuel in the United States. Those carriers that serve Miami International Airport are subject to the Florida fuel tax. The other *Amici* face the likelihood of similar taxes elsewhere in the United States. All of the foreign carrier *Amici* are exempt from federal taxes on fuel, and from customs duty on fuel and lubricants due to the existence of reciprocal arrangements between the United States and their home countries.[15]

Each of the *Amici* operates internationally under the general framework established by the Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* ("the Chicago Convention"). The details of operations in particular markets are governed by a series of bilateral executive agreements, except in the cases of Brazil and Honduras where aviation relationships with the United States are based on interna-

[8] Ill. Admin. Reg. § 130.2080(c) (1984).

[9] Mass. Act of July 1, 1985, ch. 145.

[10] A.B. No. 2419, 1985-86 Sess. (1985).

[11] Substitute Ordinance, December 1, 1985 (Alderman Vrdolyak).

[12] The foreign carrier *Amici*, and the orders of the Civil Aeronautics Board or Department of Transportation issuing their current permits are listed below: Aer Lingus Order 74-3-34 (1974); Aerolineas Argentinas, Order 77-12-53 (1977); Aeronaves de Mexico, S.A., Order 78-5-184 (1978); Aerovias Nacionales de Colombia, S.A., Order 78-10-135 (1978); Alia-Royal Jordanian Airlines, Order 79-10-15 (1979); Alitalia-Linee Aeree Italiane S.P.A., Order 71-4-1 (1971); British Airways PLC, Order 84-3-121 (1984); British Caledonian Airways Ltd., Order 82-12-118 (1982); China Airlines Ltd., Order 85-2-73 (1985); Companie Nationale Air France, Order 81-8-135 (1981); Compania Mexicana de Aviacion, S.A. de C.V., Order 78-6-127 (1978); Deutsche Lufthansa Aktiengesellschaft, Order 81-8-135 (1981); El Al Israel Airlines Limited, Order 84-6-44 (1984); Empresa Ecuatoriana de Aviacion, Order 84-5-32 (1984); Finnair Oy, Order 81-4-91 (1981); Iberia Airlines of Spain, Order 73-6-21 (1973); Iceland-air/Flugleider, H.F., Order 80-1-2 (1980); Japan Air Lines Company, Ltd., Order 81-8-135 (1981); KLM Royal Dutch Airlines, Order 81-8-135 (1981); Lineas Aereas Costarricenses, S.A., Order 80-4-148 (1980); Qantas Airways Limited, Order 81-4-92 (1981); Scandinavian Air Lines System, Order 81-8-135 (1981); Societe Anonyme Belge d'Exploitation de la Navigation Aerienne, Order 81-8-135 (1981); Swiss Air Transport Company Limited, Order 71-5-21 (1971); Tranportes Aereos Nacionales, S.A., Order 82-6-98 (1982); TAP-Air Portugal, Order 79-8-47 (1979); Trinidad & Tobago Airways Corporation, Order 82-1-7 (1982). Viacao Aerea Rio Grandense, S.A. currently operates pursuant to an exemption issued by the Department of Transportation, Order 85-12-16 (1985).

[13] 49 U.S.C. § 1508 (1982).

[14] *See* orders cited in n.12 *supra*.

[15] 26 U.S.C. §§ 4221(a), (d)(3) (1982 and Supp II 1984); 19 U.S.C. §§ 1309(a), (d) (1980), 19 C.F.R. § 10.59 (1985).

tional comity and reciprocity.[16] With minor variations in language not presently relevant, the bilateral agreements applicable in each of the foreign carrier *Amici's* markets provide for exemptions from national duties and charges on aviation fuel for the foreign carriers on the basis of reciprocal treatment for United States carriers.[17]

The more modern bilateral agreements, including those with Belgium, Costa Rica, Israel, and the United Kingdom provide further that the United States will use its best efforts to seek exemption for foreign air carriers from state and local fuel taxes.[18] None of the home countries of the foreign carrier *Amici* tax aviation fuel purchased by United States airlines at any level of government.

ARGUMENT

I. There are Established Constitutional Standards for Testing State Taxes Affecting Foreign Commerce that Should be Applied in this Case

The point of departure for the analysis of state tax legislation under the Commerce Clause is this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Reversing a line of previous cases that invalidated state taxes "on the privilege" of doing interstate business, and consolidating rulings in a number of more recent decisions, the Court laid down two general rules regarding the taxation of interstate commerce. The first was that state taxes will be judged not by their formal legal language, but rather by their practical effect on commerce. Those taxes which have the effects that the Commerce Clause forbids will be held invalid no matter

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[16] *See* Civil Aeronautics Board Order 82-6-98 (1982); and Department of Transportation Order 85-12-16 (1985).

[17] *See, e.g.*, Air Transport Agreement, October 24, 1956, United States-Colombia, 14 U.S.T. 429, T.I.A.S. 5338; Air Transport Agreement, April 3, 1957, United States-Netherlands, 12 U.S.T. 837, T.I.A.S. 4782.

[18] *See* Appendix.

what technical formulation is used. 430 U.S. at 288-89. Secondly, *Complete Auto* laid down the four basic tests applicable to taxes affecting interstate commerce. These are whether the tax is applied to an activity with a substantial nexus to the taxing state, whether there is fair apportionment of the tax, whether the tax discriminates against interstate commerce, and whether the tax is fairly related to services provided by the state.[19]

The *Complete Auto* decision involved interstate commerce only. It was not until some two years later in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) that this Court began articulating the modern test under the Commerce Clause for taxes affecting foreign commerce. At issue in *Japan Line* was an *ad valorem* property tax imposed by the State of California upon shipping containers owned by foreign companies, based and registered abroad, and used exclusively in international commerce. The Court assumed that the four part test of *Complete Auto Transit* was satisfied. It went on to conclude that:

> When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.

441 U.S. at 446.

The Court outlined two additional tests that must be met when state taxation of international commerce is at issue. One was the enhanced risk of international multiple taxation. The Court recognized the established constitutional principle that multiple taxation offends the Commerce Clause,[20] and pointed additionally to the sensitive international concerns that overlapping international taxes can raise.[21] While domestic problems of multiple state taxation can be dealt with through apportionment

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[19] 430 U.S. at 287 (1977).

[20] 441 U.S. at 451, 454.

[21] 441 U.S. at 456.

requirements, the Court pointed out that there was no authority in a position to require international apportionment.[22] It therefore held that state taxes which create a substantial risk of international multiple taxation are themselves invalid under the Commerce Clause.[23]

The second *Japan Line* consideration was whether the state tax impairs federal uniformity in an area where such uniformity is essential. The preeminent role of the Federal Government in foreign affairs has long been recognized in judicial decisions.[24] The Court pointed out that the Commerce Clause, in particular, has been interpreted to give broader authority to the Federal Government with regard to foreign commerce than to interstate commerce.[25] The Court also noted that state taxes can have implications for the country's international relations:

> "A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation,

[22] 441 U.S. at 447-48.

[23] 441 U.S. at 451.

[24] *See, e.g., United States v. Pink*, 315 U.S. 203, 233 (1942); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); L. Tribe, *American Constitutional Law* 172 (1978).

[25] 441 U.S. at 454.

> a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce."

441 U.S. at 450-51.

Although the Court stated in *Japan Line* that a state tax that violated either of these precepts was unconstitutional under the Commerce Clause, it found that the specific tax at issue in that case violated both tests. First it found that actual multiple taxation existed, because the containers in question were fully taxed in Japan in a manner which accorded with established international practice.[26] Secondly, the Court found that the ability of the United States to speak with one unified voice in its international commercial relations was impaired. In making this determination, the Court pointed to the Customs Convention on Containers[27] which, while not applicable by its terms to the tax in question, evidenced a national policy favoring the removal of impediments to the use of cargo containers in international trade.[28] The Court also noted the risk of retaliation by Japan in response to this tax, and the possibility of inconsistent levies in other states as further demonstrations of the impairment of federal uniformity.[29] The Court therefore held the California property tax unconstitutional as applied.

The *Japan Line* tests received further amplification barely two years ago by this Court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), in which the Court upheld the application of California's unitary business income tax to a United States corporation with operations in foreign countries.

[26] 441 U.S. at 454.

[27] Customs Convention on Constainers, May 18, 1956, 20 U.S.T. 301, *et seq.*

[28] 441 U.S. at 453.

[29] *Id.*

Most significant to the present case is *Container Corporation*'s refinement of the federal uniformity analysis. This aspect of the *Japan Line* criteria was divided into two subtests. The first is "whether the tax in question implicates foreign policy issues which must be left to the Federal Government" and the second is whether the tax "violates a clear federal directive." 463 U.S. at 194. The Court found that the California unitary income tax met both of these requirements.

Amici believe that the uniformity test laid down by *Japan Line* and developed further in *Container Corporation* is the key to the proper disposition of this case. The Florida fuel tax clearly intrudes into an area where federal uniformity is essential, implicates foreign policy issues that must be left to the Federal Government, and is flatly inconsistent with well established federal policy. For these reasons it must be invalidated.

II. The Florida Fuel Tax Intrudes into an Area Where Federal Uniformity is Essential

Since international aviation began to play a major role in world commerce about forty years ago, a consensus and uniform practice among nations has developed that international airlines should be exempt from taxation at all levels of government with respect to fuel, lubricants, aircraft stores, and other consumable technical supplies for their aircraft. This consensus has found expression in a number of differing ways.

Perhaps the most striking is the virtually uniform practice of nations in exempting fuel from tax at all levels of government. In the series of diplomatic notes appended to the *Amicus Curiae* brief of the United States virtually all of the major aviation trading partners of the United States, and all of the home countries of the foreign carriers presenting this brief state their acceptanec of this policy.[30] This practice is invariably followed at all levels of government by countries having federal systems (*e.g.*, Notes of Mexico and the Federal Republic of Germany) or which otherwise allow the imposition of taxes at local levels (*e.g.*, India, Brief for the United States as *Amicus Curiae* at 13, n.6). The established custom of nations has long been recognized as a source of international law,[31] and plainly the established international legal rule favors exemption from tax on the basis of reciprocity.

[30] *See, e.g.*, Note of the Embassy of France, Brief for the United States, Appendix, at 18a; Note of the Embassy of Trinidad & Tobago, *Id.* at 53a; Note No. 190 of the Embassy of the United Kingdom, *Id.*, at 57a.

This policy has also found more formal expression through the Chicago Convention and the actions of the International Civil Aviation Organization. Article 24(a) of the Convention provides that "fuel, lubricating oils, spare parts, regular equipment and aircraft stores onboard an aircraft" of one of the contracting parties engaged in international operations must "be exempt from customs duty, inspection fees, or similar national or local duties and charges." 61 Stat. 1186.

The International Civil Aviation Organization ("ICAO") was established by the Chicago Convention. The United States is an active member of this organization. More than thirty years ago, the Air Transport Committee of ICAO determined that the Convention did not deal completely with the area of international taxation, and undertook a thorough study of this question. *ICAO's Policies on Taxation in the Field of International Air Transport*, ICAO Doc. 8632-C/968, at 1 (Nov. 1966). This document, in turn, served as the basis for a resolution adopted by the ICAO Council on November 14, 1976 which stated that:

> "Fuel, lubricants and other consumable technical supplies taken onboard for consumption during flight shall be further exempt from all customs and other

[31] *See, e.g.*, *The Paquette Habana*, 175 U.S. 677, 700 (1900); Restatement of Foreign Relations Law of the United States § 102 (1)(a) (Tent. Draft No. 1, 1980); M. Whiteman, I *Digest of International Law*, 75-90 (1963).

duties or, alternatively, all such duties levied shall be refunded . . . ."

Id. at 4.

The term "customs and other duties" was specifically defined to include excise, sales, consumption and other internal taxes levied upon fuel, lubricants, and other consumable technical supplies by any taxing authority within a state. *Id.*

The United States has benefited from being part of this international consensus because it has eliminated potential taxes on all U.S. international carriers. If the United States is to continue as part of this established system, it must have a uniform national policy that aviation fuel used or purchased by foreign airlines in the United States is not subject to state or local taxation where reciprocal privileges are granted to U.S. carriers. To permit states to intrude into this area unilaterally is to make United States' participation in such a system of reciprocal exemptions impossible. As the Court noted in *Japan Line*, this type of tax inevitably will lead to retaliatory taxes from other nations with federal systems, and from countries that are dissatisfied with the degree of reciprocity offered by the United States. That retaliation will, of necessity, be against all United States carriers, and not simply those based in Florida.[32] The series of diplomatic notes appended to the Brief of the United States leaves no doubt that the United States carriers would face retaliation in many countries if the Florida fuel tax is allowed to stand.[33]

The only exception to this general system known to *Amici* is Canada, where apparently some taxes are imposed by provincial governments on aviation fuel. The case of Canada is a forthright demonstration of the importance of federal uniformity in this area. Although Canada's allowance of local taxes on international aviation fuel may be an international anomaly, only the Federal Government is in a position to deal with this departure from the international norm of reciprocity. There is no way the State of Florida, or any other state, can deal with the imposition of fuel taxes at the provincial level in Canada. Obviously, only the United States Federal Government can conduct diplomatic negotiations and seek clarification of Canada's policy and assurances that U.S. carriers will not be so taxed. It is equally obvious that the fact that Florida and, potentially, other local jurisdictions within the United States purport to impose taxes on aviation fuel purchased by international airlines severely undercuts the position of the United States in dealing with the Canadian authorities.

[32] 441 U.S. at 453.

[33] *See*, n.2, *supra*.

In particular, the existence of state taxes in this country would make it impossible for the United States to offer exemption from taxes in this country for Canadian carriers as a *quid pro quo* for analogous treatment for United States carriers in Canada. It is exactly this type of exchange which has been the foundation of the existing international policy of reciprocal exemption. Because the existing international consensus rests on the rock of reciprocity, the Federal Government must be in a position to approach other nations that deviate from this consensus with a single-minded policy that only it can express. A state tax that frustrates such an effort clearly implicates foreign policy issues that must be left to the Federal Government.

III. The Florida Fuel Tax Directly Contradicts the Foreign Policy of the United States

The Florida fuel tax also fails the second portion of the uniformity test in that it expressly contradicts firmly established United States policy.

As the *Amicus Curiae* brief submitted on behalf of the United States clearly points out, it is, and has been for many years, the policy of the United States that international airlines should be exempt on the basis of reciprocity from any taxes on fuel, lubricants, and consum-

able technical supplies. (*See* Brief for the United States at 10-22.) The manifestations of this policy are numerous. First is the Chicago Convention and the policies adopted by the International Civil Aviation Organization, described above. The United States is a party to the Convention, and a member of the ICAO.

Next is the uniform and extensive network of bilateral agreements into which the United States has entered. As discussed in more detail in the Brief for the United States, bilateral agreements entered into by this country since the end of the Second World War have uniformly contained language committing each party to exempt airlines of the other from taxes on fuel, lubricants, and consumable technical supplies, on a basis of reciprocity. By their terms most of these provisions apply only to national duties and charges. However, as the Brief for the United States observes, in this respect the bilateral agreements do not reflect the full scope of the United States aviation policy. *Id.* at 17. The reasons for this are mostly historical. In the earlier days of aviation, most international airlines used bonded fuel exclusively, which is clearly exempt from all state taxation.[34] When bonded fuel became unavailable, carriers found that the limited number of jurisdictions which had direct international services typically either impose no tax at all on fuel used in international services, or proportioned the tax on the basis of mileage (as did Florida) so that the economic burden became insignificant. It is only in recent years, when the number of destinations within the United States served by foreign carriers has increased and the volume of non-taxable bonded fuel has decreased, that states have made more determined efforts to tax aviation fuel. Thus it is only recently that state fuel taxes have become matters of serious concern for foreign airlines.

Additionally, many of the most recent United States bilateral agreements deal specifically with the subject of state and local fuel taxes. Starting with the so-called

[34] *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).

Bermuda II Agreement between the United States and the United Kingdom in 1977,[35] recent agreements have commonly included provisions requiring the United States to use its best efforts to obtain exemptions for foreign carriers from state and local taxes.[36] As the Solicitor General observes, this is a strong indication of United States policy in this area. (Brief at 20.) That foreign nations have interpreted these provisions as demonstrating a clear policy commitment is reflected in the terms of the numerous diplomatic notes appended to the Solicitor General's brief.[37]

A third manifestation of this policy is found in statements made by federal officials directly to the State of Florida. Prior to the enactment of the 1983 tax legislation, the State Department wrote to the State of Florida noting concerns expressed by foreign governments regarding the appropriateness of imposing certain taxes on foreign air carriers "in view of the generally-accepted and long standing international practice of reciprocally exempting such items from taxes."[38] The State Department also noted that some nations have raised the possibility of retaliatory taxation which would frustrate the reciprocal system of international tax exemptions. The Florida Department of Revenue responded to the State Department in reassuring terms, noting the generous

[35] Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, 28 U.S.T. 5367, T.I.A.S. 8641, Art. 8(5).

[36] *See, e.g.*, Air Transport Agreement, October 23, 1980, United States-Belgium, T.I.A.S. 9903; Air Transport Agreement, November 23, 1983, United States-Costa Rica, T.I.A.S. ——; Protocol to Air Transport Agreement, United States-Israel, August 16, 1978, 29 U.S.T. 3144, T.I.A.S. 9002.

[37] *See*, notes 2 and 30, *supra*.

[38] Letter dated September 29, 1982 to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications (J.S. App. A-82).

treatment that Florida accorded to foreign carriers, and stating that Florida recognized the importance of international aviation.[39] When the tax was proposed early in 1983, the State Department again wrote to the Department of Revenue expressing its surprise at the proposal and proposing that the legislation incorporate the concept of reciprocal exemption from tax. Failing this, the Department of State expressed concern about "serious foreign relations problems," if the tax were imposed.[40] It is not often that a party contemplating actions which raise constitutional questions receives a direct and unambiguous indication of the policy of the United States. Yet this is exactly what happened here. Unfortunately, the State of Florida disregarded that statement of policy in enacting the fuel tax, and has studiously ignored Federal policy throughout all of the litigation regarding the Florida fuel tax.

A final demonstration, if one is needed, lies in the actions that the United States has regularly taken in foreign countries to protest possible taxation of aviation fuel, and to secure exemptions based on reciprocity for United States carriers. (*See* Brief for the United States at 20.) Protests by the United States of fuel taxes in foreign countries can only have a very hollow ring if state taxes on aviation fuel, such as that imposed by Florida, are allowed to stand in this country.

In summary, the Florida fuel tax is clearly unconstitutional under the federal uniformity standards established by *Japan Line* and *Container Corporation*. Taxation of international airline fuel is inherently an area

[39] Letter dated October 25, 1982 to Deputy Assistant Secretary of State for Transportation and Telecommunications from Executive Director of State of Florida Department of Revenue (J.S. App. A-85).

[40] Letter dated March 7, 1982 [1983] to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications, (J.S. App. A-87).

where a uniform federal policy is required in order to secure for United States carriers the benefit of reciprocal exemptions from tax in foreign countries. The Florida tax intrudes impermissibly into this sensitive area of international relations. At the same time, Florida directly and knowingly has contradicted the express policy of the United States in the international area. If the Florida tax is not held unconstitutional, the conduct of the foreign relations of the United States by the United States Government in this area will be seriously impaired.

IV. The Florida Fuel Tax is Essentially Similar to the Tax Disapproved in *Japan Line*

While this Court applied the *Japan Line* precepts to the California unitary income tax in *Container Corporation*, it concluded that California's tax was constitutional. The reasons for the Court's holding on that specific point do not, however, apply to the present case.

In *Container Corporation*, the Court found no automatic asymmetry between the California unitary tax, and the "arms' length" approach to international tax accounting questions advocated by the Federal Government. It noted that any conflict between taxing regimes was not inevitable and depended on specific rulings regarding the application of allocation formulae to particular cases. Similarly, the Court found that there was no acceptable "bright line" rule that would avoid this conflict.

Those considerations do not apply to this case. The symmetry that has been established through years of international practice and negotiations is that of reciprocal exemption from tax. The very existence of the Florida tax undercuts that structure and creates an asymmetry that operates to the disadvantage of foreign countries. This is precisely the type of problem that the Court had in mind when it established the federal uniformity requirement under *Japan Line*. 441 U.S. at 453. The Florida tax is a flagrant disruption of a balanced system of reciprocal exemptions. The "bright line rule" to rem-

edy this problem is, of course, to forbid states from any taxation of foreign airline fuel purchased for use in international air transportation. The reciprocal exchange of exemptions on which this approach is based make this rule fair for the United States, and for the State of Florida.

A second major consideration in upholding the California unitary business tax in *Container Corporation* was the fact that the tax burden fell on United States domestic corporations. This is clearly not the case here. The actual taxpayers in this and the companion cases that the Court has not yet decided to review are all companies established under the laws of foreign nations with their principal base of operations in foreign countries. They are uniformly owned and controlled by nationals of their home countries. Indeed, a substantial number of them are owned and controlled directly by foreign governments.[41] The point of this portion of the *Container Corporation* analysis was, of course, that foreign nations have little or no reason to be concerned over the tax treatment given by the United States to its own domiciliary companies. However, where the companies are owned by foreign nationals or their *governments*, the reasons for concern are particularly strong. The substantial number of diplomatic notes sent to the United States concerning the Florida fuel tax show that this concern is real.

The Court also noted that Container Corporation was clearly subject to income tax in California and that the amount of that tax depended as much or more on tax rates as on the technical definition of the income base. Again, this argument does not apply to the present case. The point here is that any tax on aviation fuel raises serious reciprocity issues. The issue is not what portions

[41] For example, Aerolineas Argentinas, Aeronaves de Mexico, S.A., Compania Mexicana de Aviacion, S.A. de C.V., Empresa Ecuatoriana de Aviacion, Trinidad & Tobago Airways Corporation and Viacao Aerea Rio-Grandense, S.A. are all either majority or wholly-owned by their respective governments.

of such fuel should be taxed. The established international rule is that none of it should be.

Lastly, the Court pointed to the distinctions between the property tax involved in *Japan Line* and the income tax at issue in *Container Corporation*. In particular, the Court focused on the fact that situs-based rules traditionally play a much larger role in the property tax area than with respect to income taxes, particularly in view of the difficulties that governments often face in allocating income among the component parts of a single multinational enterprise.

Once again, this distinction does not apply here. Excise taxes such as that imposed by Florida have always been strongly situs-based since they typically focus on a single transaction and the location of that transaction. Thus this Court has held that a state may not tax a sale that takes place outside of its borders.[42] Similarly, the Court has recognized that compensating use taxes must be limited to taxable uses within the confines of the state.[43] Indeed the arguments advanced by the State of Florida and the Solicitor General that true multiple taxation cannot take place in this case because the taxable transaction —the sale of the fuel—takes place only in Florida underscore this very point.[44] Situs factors are of much greater relevance to Florida's excise tax than to the income tax at issue in *Container Corporation*.

V. The Florida Tax is Subject to Scrutiny Under the Commerce Clause

During the course of litigation regarding the fuel tax, Florida has argued that its tax is not really a tax on

[42] *See, e.g., National Bellas Hess Inc. v. Department of Revenue*, 386 U.S. 753, 756-58 (1967); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954).

[43] *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 210-11 (1960); *General Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 337-38 (1944).

[44] Brief for the United States at 30; Appellee's Reply Brief to *Amicus Curiae* at 3-4.

aviation fuel, and that even if it is viewed as a fuel tax, fuel is not an instrumentality of commerce subject to the rule of *Japan Line*. Florida first contends that the Florida tax is not imposed upon aviation fuel, and that airlines do not pay it. Instead, in the view of the State of Florida, this tax is strictly an excise on the withdrawal of fuel from storage by fuel vendors located in that state. Factually this contention is completely wrong. Legally, it is irrelevant.

For one thing, the terms of the Florida fuel tax completely undercut the State's argument. The Florida legislature stated its intention in enacting the fuel tax in the following terms:

> It is the intent of the Legislature that sales of motor fuel and special fuel shall be subject to the tax imposed by this chapter. However, in recognition of the unique business practices which characterize the sale of such fuel at the retail level, and of the existing public and private sector administrative structures which exist pursuant to Chapter 206 for the collection of motor fuel and special fuel excise tax, the Legislature hereby provides a method for imposing and collecting the sales tax on such fuel in a manner least likely to increase public and private costs of tax collection and administration.

Section 212.60(1) Laws of Florida.

In other words, the legislature's goal is to tax fuel. The existing administrative structure, involving collection of the tax by fuel retailers, was kept intact, however, as a matter of administrative convenience. As stated more specifically in Section 212.70(2)(a) of the law:

> This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and necessity that the tax shall be paid upon the first sale or transfer of title within this State whether by a distributor, dealer, or retail dealer, *who shall act as agent for the State in the collection of said tax* whether such distributor, dealer, or retail dealer is the ultimate seller or not.

The statutory role of dealers as agents for the state collecting this tax from the ultimate consumer (i.e., the carriers) is reaffirmed by provisions of Florida law requiring this tax to be passed on to the consumer, and separately identified in billings (Florida Statutes § 212.70 (2)(b)), forbidding retailers from claiming that they will absorb the tax (§ 212.70(2)(c)) and providing for misdemeanor penalties if either of these requirements is not met (§ 212.70(2)(d)). The law that the State of Florida is attempting to defend belies its central argument. There is no question that what is being taxed here is aviation fuel, and that the taxpayer is the foreign air carrier.

Even if this Court were to accept the State of Florida's construction of the tax, the Commerce Clause precepts of *Japan Line* and *Container Corporation* would still apply fully. The central holding of *Complete Auto Transit* was that rigid formalistic approaches will no longer be used in evaluating state taxes under the Commerce Clause. Instead, the Court will examine the practical effects of those taxes, and determine if those effects are inconsistent with Commerce Clause requirements.[45]

The court elaborated on this holding in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). At issue in that case was the constitutionality of a severance tax imposed by the State of Montana on the removal of coal from that state's mines. The Montana Supreme Court, relying on *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) held that the tax was imposed on the severance of coal, a purely intrastate activity preceding entry of the coal into interstate commerce.

This Court refused to accept the Montana Court's analysis. Instead it noted that *Heisler*, like the cases relied upon by the State of Florida[46] were based on an out-

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[45] 430 U.S. at 249.

[46] *Nashville, Chatanooga, and St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933); *Eastern Air Transport, Inc. v. Tax Comm'n*, 285 U.S.

moded view of the law, dating from a time when interstate commerce was held completely immune from taxation, and not liable to "pay its own way". 453 U.S. at 616. As a result the Court held:

> ". . . that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit's* four part test.

453 U.S. at 616 (footnote deleted).

The similarity of the Montana statute's language taxing the "severance" of coal to the language of the Florida statute taxing the "withdrawal from storage" of aviation fuel is obvious. So is the similarity of the practical effects of these two taxes. Both have a clear practical effect on federally regulated commerce. Both are therefore subject to scrutiny under the Commerce Clause.

A second argument advanced by the State of Florida is that fuel is not an instrumentality of commerce. Presumably, as a result, the *Japan Line* rule would not apply to taxation of aviation fuel.

Again this argument lacks factual basis. This Court has long recognized the common sense proposition that fuel is vital to interstate and foreign commerce and, most particularly, to transportation. For example, in *Helson and Randolph v. Kentucky*, 279 U.S. 245 (1928) the Court considered the validity of a use tax imposed by Kentucky on fuel purchased out of state and consumed by ferry boats operating within that state in interstate commerce. The court held this tax unconstitutional reasoning in part that:

147 (1932); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *United Aid Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid on the use of the ferry boat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens said commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transaction is effected." 279 U.S. at 252.

The fuel used in propelling the airplanes of *Amici curiae* is every bit as much an instrumentality or means of international commerce as the fuel that powered the ferry boats at issue in *Helson*.[47] As the Florida Trial Court quite properly concluded in a companion case to the present litigation, fuel is the "*sine qua non*" of international aviation.[48]

VI. There is no Basis for Florida's Contention that its Tax Does Not Violate Federal Policy

Florida also argues persistently that there is no federal policy which this fuel tax violates. Presumably Florida would have this Court believe that the Solicitor General of the United States in an *Amicus Curiae* brief prepared in cooperation with the Legal Adviser of the Department of State and the General Counsel of the Department of Transportation misstates this country's foreign policy. Obviously, the *Amicus Curiae* Brief for the United States reflects the official position of the United States as articulated by those who are responsible for establishing that

[47] *See also United Air Lines v. Mahin*, 410 U.S. 623, 636 (1973, Douglas J., dissenting).

[48] *Lineas Aereas Costarricenses, S.A. v. State of Florida, Dept. of Revenue* (No. 84-922) (J.S. App. A-25, 33).

position and who deal with these issues in the international arena on a day-to-day basis.[49]

The State of Florida and a bare majority of the Florida Supreme Court have seized upon the one portion of the record that, when viewed superficially, favors their point of view. The focus of this myopic analysis has been the fact that the standard bilateral aviation agreements expressly prohibit only national duties and charges on fuel. Florida uses this as evidence that the Federal Government has already taken the position that state taxes of the type at issue in this case are constitutionally permissible. That conclusion cannot stand against the overwhelming evidence of an express federal policy that the Florida approach ignores. Moreover, the conclusion that the Florida Supreme Court draws from its analysis of the bilateral agreements is without validity even when considered on its own merits. *Amici* believe there is no basis for the presumption that the absence from an older bilateral of a specific exemption from state taxes gives Florida, or any other state, *carte blanche* to impose such taxes.

In *Japan Line*, for example, the Court noted that a multilateral convention concerning shipping containers did not provide exemption from state taxes.[50] This did not prevent the Court from invalidating the California state tax on Commerce Clause grounds. Indeed, it relied upon the Convention as evidence of a federal policy.[51] If the reasoning of the Florida Supreme Court were to be followed to its logical conclusion, the states would be free to impose any kind of tax on the fuel, provisions, or aircraft of foreign airlines as long as such taxes were not specifically exempt from taxation by a bilateral air transportation agreement. This is clearly not the law as

[49] The difference between this case and *Container Corporation*, where no brief was filed by the United States, is also manifest.

[50] 441 U.S. at 446, n.10.

[51] 441 U.S. at 452-53.

set forth in *Japan Line*. The court below failed to recognize that it is the Commerce Clause of the Constitution, and not simply the implications that might be drawn from the terms of the bilateral aviation agreements, that precludes Florida from applying its fuel tax to the purchase of fuel by foreign-owned and foreign-based airlines.

Even if there were some merit in the analysis of the court below regarding the reach of the tax clauses of some of the bilateral agreements, the Florida Supreme Court and the State of Florida have failed totally to recognize that the cited tax clauses of the bilaterals are only one source of United States international aviation policy. The historical reasons for the scope of the tax provisions of some bilateral agreements are clearly explained in the Solicitor General's brief. It is manifest that these provisions by themselves do not reflect the full ambit of United States policy and the international consensus of which it is a part. Rather that policy and consensus are entwined in the pervasive web of international arrangements in the aviation area such as the best efforts language of many bilaterals, the correspondence between the Department of Revenue and the Department of State, the Chicago Convention, the ICAO Resolutions, the efforts by the United States to negotiate tax reductions for U.S. carriers, and the diplomatic notes submitted by twenty-five foreign countries. This overwhelming evidence of a federal policy and an international consensus simply cannot be wished away.

A related argument is that the bilateral provisions and the ICAO Resolutions address discrimination in taxation, and that the Florida fuel tax does not discriminate since it treats all carriers equally.[52] Similarly, the state contends that the fuel tax creates no international asymmetry.

[52] This, of course, was not true of the original Florida fuel tax. Only when the Florida Supreme Court struck down the invidious income tax credit favoring United States carriers could this argument be seriously made.

This argument is easily answered. First of all, the bilateral provisions and the ICAO Resolutions do discuss the subject of discrimination, but deal with this problem by requiring reciprocal exemptions from tax. Thus the fact that the Florida tax, after the decision by that state's Supreme Court, may not be facially discriminatory is not relevant.

Secondly, the symmetry that *Japan Line* and *Container Corporation* are addressing, is not limited to equality between the treatment in the United States of U.S. and non-U.S. companies. In *Japan Line*, the California property tax treated U.S. and Japanese cargo containers identically. The court nonethless had no trouble concluding that the tax creates an aysmmetry to Japan's disadvantage because of a practice of reciprocal exemption from tax similar to that at issue here. 441 U.S. at 453. Florida's argument simply does not address the issues in this case.

CONCLUSION

The decision of the Florida Supreme Court should be reversed. In sustaining a state tax on fuel purchased by foreign air carriers for exclusive use in international commerce, the Florida Court has ignored the teachings of this Court in *Japan Line* and permitted the State of Florida to intrude into a well-settled area of exclusive federal jurisdiction. The simple fact is that the invalidation of the Florida tax in this case would permit the Federal Government to deal openly and unambiguously with the Canadian deviation from the international norm unhampered by the existence of state taxes at variance with a clear federal policy. On the other hand, the sustaining of the Florida tax would open the floodgates to other similar state taxes, to foreign retaliation, and to the crumbling of what has become the custom of nations with respect to this issue.

The threat of foreign retaliation and the undermining of a Federal Government policy painstakingly worked out with many nations over the past forty years are the clear

foreign policy implications of a decision upholding the Florida tax. The Federal Government has been at the forefront of developing the policy of reciprocal exemption from taxation of the instrumentalities of international aviation. If the states are allowed to impose taxes at variance with that policy, the policy itself becomes a mockery, and no other nation could agree to grant exemptions to the United States with any confidence that such exemptions would be fully reciprocated. Where a state law would have such an impact, it clearly implicates foreign policy issues that must be left to the Federal Government.

The fact that this case involves a country—indeed the only country—that does not follow the international consensus on reciprocal exemption makes it all the more essential that the Federal Government be left free to persuade that country to change its policy. Such efforts at persuasion would have little hope of success if the various states could tax what the Federal Government is urging other countries not to tax. In short this is a case where federal uniformity is essential and where state taxation is fatally inconsistent with the requirement of such uniformity.

Respectfully submitted,

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APPENDIX

BELGIUM

Air Transport Agreement, October 23, 1980, United States-Belgium, TIAS 9903, Article 9(5).

Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

COSTA RICA

Agreement Concerning Air Transport, November 23, 1983, United States-Costa Rica, TIAS ——, Article 9(5).

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

ISRAEL

Protocol Between the United States of America and Israel Amending the Agreement of June 13, 1950, as Amended, August 16, 1978, United States-Israel, 29 UST 3144, TIAS 9002, Article 10.

Each Party shall use its best efforts to secure for the designated airlines of the other Party on a reciprocal

basis an exemption from taxes, charges and fees imposed by state, regional and local authorities on the aircraft and regular equipment of such airlines and on the items listed in paragraphs (b) and (c) of Article IV of the Agreement [fuel and other items], as well as from fuel through-put charges, in the circumstances described in those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.

JORDAN

Air Transport Agreement, June 8, 1980, United States-Jordan, TIAS 9868, Article 9(5).

Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

UNITED KINGDOM

Agreement Concerning Air Services, July 23, 1977, United States-United Kingdom, 28 UST 5367, TIAS 8641, Article 8(5).

(5) Each Contracting Party shall use its best efforts to secure for the designated airlines of the other Contracting Party on a reciprocal basis an exemption from taxes, charges and fees imposed by State, regional and local authorities on the items listed in paragraphs (1) and (2) of Article 9 (Customs Duties), as well as from fuel through-put charges, in the circumstances described under those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.